No. 90-748

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

WILLIAM KUNTZ, III,

Petitioner,

against

THE LITTLE MIAMI RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, EIGHTH APPELLATE DISTRICT, CUYAHOGA COUNTY, OHIO

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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PETITIONER'S FORMULATION OF QUESTION PRESENTED FOR REVIEW

That the Court of Appeals for the Eight [sic] District of Ohio at Cleveland denied petitioner equal protection under the United States Constitution between citizens of the various states by the application of a Local Rule of Court in dismissing his appeal from the Common Pleas Court of Cuyahoga County, Ohio.

RESTATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether the dismissal of Petitioner's appeal to the Court of Appeals for the Eighth Appellate Judicial District of Ohio for non-compliance with a local rule of that Court, which rule explicitly states that non-compliance will be grounds for dismissal of an appeal, denied Petitioner the equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution.

LISTING OF PARTIES

Respondent is the Little Miami Railroad Company which became a wholly-owned subsidiary of the Penn Central Corporation in 1979. Respondent has no subsidiaries.

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STATEMENT OF THE CASE

This case is before the Court on the petition of William Kuntz III for a writ of certiorari directed to the Court of Appeals for the Eighth Appellate Judicial District of Ohio. The Petitioner asks this Court to review the February 2, 1990 order of the Ohio Court of Appeals dismissing Petitioner's appeal from the Court of Common Pleas of Cuyahoga County, Ohio for failure to comply with Rule 4(A) of the appellate court's local rules of practice. Petition for Certiorari, Appendix B at 10b-11b. Petitioner's motion for discretionary review and claimed appeal as of right to the Supreme Court of Ohio were denied and dismissed on June 27, 1990 because "no substantial constitutional question exists". Petition Appendix A.

Petitioner brought this action in the Court of Common Pleas of Cuyahoga County, Ohio seeking appraisal of his 50 "betterment" shares of Respondent Little Miami Railroad Company ("Little Miami") stock pursuant to Ohio Revised Code § 1707.85. Petitioner's Little Miami shares were extinguished as part of a merger between Little Miami and a wholly-owned subsidiary of Penn Central Corporation in late 1979. Petitioner rejected Little Miami's offer of $25.00 per share (total value of $1,250.00) and had demanded $4,000.00 per share (total value of $200,000.00). At Petitioner's request, the trial court appointed an appraiser pursuant to Ohio Revised Code § 1707.85. The court-appointed appraiser independently valued Petitioner's shares at $29.00 per share (total value of $1,450.00).

This case was scheduled for hearing on confirmation of the court-appointed appraiser's report on June 2, 1983. It became apparent at that hearing that Petitioner intended to offer numerous exhibits which had not been supplied to Little Miami and testimony from an expert witness who had not previously been identified to Little Miami or to the court. The trial court continued the hearing until September 19,

1983 and orally ordered the Petitioner to produce copies of his exhibits to Little Miami and to the court's appraiser, to identify his expert witness, and to produce copies to the expert's report. Petitioner failed to do any of this, resulting in the vacation of the September 19, 1983 hearing date.

This case was set for pretrial conference on August 7, 1989, after Petitioner had failed to take any action on the matter for six years. In violation of Cuyahoga County Common Pleas Court Rule of Practice 21, Petitioner did not file the pretrial statement required for this conference. During the pretrial conference the trial court again set dates by which Petitioner was required to produce his exhibits to Little Miami and ordered that Petitioner's expert witness be made available for deposition in accordance with Cuyahoga County Common Pleas Court rule of Practice 21.1(D). These orders were reduced to writing in an order entered upon the court's journal on October 6, 1989. Respondent's Appendix 1.

Petitioner disregarded the trial court's 1989 orders as well. Little Miami then moved for dismissal. Petition Appendix G. Petitioner failed to respond to Little Miami's motion to dismiss. Petition Appendix I at 5i-6i. Little Miami's motion to dismiss was granted by order journalized on December 8, 1989. Petition Appendix H.

On January 17, 1990, Petitioner filed a notice of appeal to the Court of Appeals for the Eighth Appellate Judicial District of Ohio. Petitioner's notice was filed late — 40 days after the entry of the final order of the Common Pleas Court and the issuance of notice thereof. Petition Appendix I at 5i-6i. *See* Ohio R. App. P. 4(A). Petitioner then failed to file a praecipe for transmittal of the trial court record as required by Eighth District Court of Appeals Rule 4(A). Petitioner's appeal was dismissed on February 5, 1990 in accordance with Rule 4. Petition Appendix C. The February 5 entry dismissing Petitioner's appeal granted Petitioner ten days to seek reconsideration. Petition Appendix B at 11b. Petitioner's motion for reconsideration was not filed until February 22, 1990. Peti-

tioner's motion for reconsideration was denied on March 12, 1990. Petition Appendix F. Petitioner then filed a notice of appeal to the Supreme Court of Ohio, appealing only from the February 5, 1990 dismissal of his appeal. Petition Appendix B at 8b.

REASONS WHY THE WRIT OF CERTIORARI SHOULD BE DENIED

THE PETITION FOR CERTIORARI DOES NOT PRESENT AN IMPORTANT QUESTION OF FEDERAL LAW FOR DECISION BY THE COURT

Supreme Court Rule 10 instructs that,

> review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor.

Rule 10 then goes on to list three situations illustrative of the type of special and important reasons which warrant certiorari. *See also National Labor Relations Bd.* v. *Pittsburgh Steamship Co.*, 340 U.S. 498, 502 (1951) ("Certiorari is granted only in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal."). Petitioner has made no effort to show that this case involves any of the special and important reasons for which the writ of certiorari is reserved. This case does not involve a decision of a United States Court of Appeals and Petitioner has made no showing that the state court decision of which he seeks review conflicts with the decision of any Federal Court of Appeals or of any other state court of last resort. Finally, as is demonstrated below, Petitioner's attempt to raise a Federal constitutional issue is foreclosed by prior decisions of the Court.

Petitioner asserts that the dismissal of his appeal pursuant to the Ohio Court of Appeals' Local Rule 4(A) denied him the equal protection of the laws guaranteed by the United States Constitution. *See* Petition for Certiorari at i. The Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne*

v. *Cleburne Living Center*, 473 U.S. 432, 439 (1985). *See also Parham* v. *Hughes*, 441 U.S. 347, 358 (1979) ("The function of [the equal protection clause] of the Constitution is to measure the validity of classifications created by state laws."). Rule 4(A) provides, in relevant part, as follows:

> The clerk of the trial court shall not prepare and assemble the documents constituting the record on appeal . . . unless and until appellant has filed a praecipe.
>
> If the appellant fails to file a praecipe within 10 days of filing the notice of appeal in the trial court, it will be grounds for dismissal of the appeal.

Eighth Appellate Judicial District Local Rule 4(A). Rule 4(A) does not create any classifications and does not make distinctions between persons similarly situated. All appellants in the Ohio Eighth District Court of Appeals are required to file a praecipe and all appellants face the penalty of dismissal of their appeal for failure to do so within the time limits prescribed. The record does not show, and Petitioner has not alleged, that Rule 4(A) was applied differently to him than it has been applied to other litigants. There is simply no issue of disparity of treatment. Thus, there is no equal protection issue. *See Blair* v. *Supreme Court of Wyoming*, 671 F.2d 389, 391 (10th Cir. 1982) (No 14th Amendment violation in state supreme court's dismissal of untimely appeal absent showing that other untimely appeals were allowed).

The basis for Petitioner's claim that he was denied equal protection of the law is difficult to discern from his Petition. Petitioner apparently bases his claim on the assertion that not all courts of appeals in Ohio have local rules identical to Eighth District Rule 4(A). *See* Petition at 5. Petitioner apparently believes that he had a constitutional right to rely upon the local rules of an Ohio appellate court other than the court in which his appeal was pending. *See* Petition Appendix B at 5b & 6b.

The twelve Ohio courts of appeals are authorized to adopt rules governing the practice before them by the Ohio Constitution, Ohio Const. art. IV § 5(B), and by the Ohio Rules of Appellate Procedure, Ohio R. App. P. 31.[1] There is no federal constitutional requirement that all twelve of these courts must adopt identical rules of practice. As the Court recently reiterated, " '[t]he Fourteenth Amendment does not prohibit legislation merely because it is special, or limited in its application to a particular geographical or political subdivision of the state.' " *Kadrmas* v. *Dickinson Public Schools*, 487 U.S. 450, 462 (1988) (quoting *Fort Smith Light Co.* v. *Paving District*, 274 U.S. 387, 391 (1927)). *See also Witte* v. *Justices of New Hampshire Superior Court*, 831 F.2d 362, 364 (1st Cir. 1987) ("Nothing in the federal constitution requires states to have identical operations in each of their counties."). There is certainly no federal constitutional right to rely upon the rules of one court when litigating in a different court.

Petitioner also seems to argue that his Fourteenth Amendment rights were violated by the "Arcane Provision" of Ohio Revised Code § 1707.85 requiring his appraisal action to be filed in the county where Little Miami had its office. Petition at 4, 6-7. The Court has repeatedly held that there is no Fourteenth Amendment right to a particular venue within a state, stating that:

> "[I]t is fundamental rights which the Fourteenth Amendment safeguards and not the mere forum which a State may see proper to designate for the enforcement and protection of such rights. . . . It is not under any view the mere tribunal into which a person is authorized to proceed by a State which determines whether the equal protection of the law has been afforded, but whether in the tribunals which the State has provided equal laws prevail."

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[1] The Ohio Rules of Appellate Procedure, applicable to all Ohio courts of appeals, plainly should have alerted Petitioner to the possible existence of local rules in the Eighth District Court of Appeals. *See* Ohio R.App. P. 31.

American Motorists Insurance Co. v. *Starnes*, 425 U.S. 637, 644-45 (1976) (quoting *Cincinnati Street Railway Co.* v. *Snell*, 193 U.S. 30, 36-37 (1904)). There is certainly no Fourteenth Amendment right to a particular forum merely because the judges therein may be more or less likely to rule in favor of a particular party. *See* Petition at 6-7.

Petitioner has no Fourteenth Amendment claim. " 'This Court has never held that States are required to establish avenues of appellate review,' " but has held only " 'that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts.' " *Williams* v. *Oklahoma City*, 395 U.S. 458, 459 (1969) (per curiam) (quoting *Rinaldi* v. *Yeager*, 384 U.S. 305, 310-311 (1966)). Eighth District Rule 4(A) does not unreasonably impede open and equal access to appellate review. The rule is a rational measure, applicable to any appeal, to ensure that the record to be reviewed is promptly and expeditiously assembled and transmitted to the Court of Appeals. States have a legitimate interest in providing for a prompt resolution of litigation. *Lindsey* v. *Normet*, 405 U.S. 56, 70 (1972).[2] Rule 4(A) permissibly places the burden on the party initiating an appeal to procure transmittal of the lower court's record. Similar requirements, with similar sanctions, exist in the rules of practice of several of the United States Courts of Appeals. Second Cir. Civil Appeals Management Plan ¶¶3 & 7(a); Third Cir. R. 15; Sixth Cir. R. 13(a).

Petitioner's equal protection claim is fatally defective on another ground as well. The Court has recognized "the basic principle that [one] who alleges an equal protection violation has the burden of proving 'the existence of purposeful

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[2] The Ohio Supreme Court has observed that the system of local rules of the Eighth District Court of Appeals "enables that court to get right to the focal point of each case and expedite the orderly flow of its business, thus vidicating the public's interest in the prompt and efficient dispatch of justice." *DeHart* v. *Aetna Life Insurance Co.*, 69 Ohio St. 2d 189, 191, 431 N.E.2d 644, 646 (1982).

discrimination'." *McClesky* v. *Kemp*, 481 U.S. 279, 292 (1987) (quoting *Whitus* v. *Georgia*, 385 U.S. 545, 550 (1967)). *See also Joyce* v. *Mavromatis*, 783 F.2d 56, 57 (6th Cir. 1986) ("The equal protection argument fails here because the wrong is not alleged to be directed toward an individual as a member of a class or group singled out for discriminatory treatment."). Petitioner has not shown, nor even contended, that Eighth District Rule 4(A) singles out any identifiable group or class for purposeful discrimination, either on its face or as applied. It may be that it is somewhat more difficult for a non-resident to obtain access to the local rules of any state court; however, that fact does not mean that the existence of local rules equally applicable to residents and non-residents is impermissibly discriminatory.[3]

Petitioner further appears to contend that dismissal of his appeal violates some Ohio policy against using dismissal as a sanction for non-compliance with "technical" court rules, relying on *O'Brien* v. *Stein*, 47 Ohio App. 3d 191, 547 N.E.2d 1213 (Franklin County), *motion to certify overruled*, 39 Ohio St. 3d 710, 534 N.E.2d 79 (1988), *cert. denied*, ____ U.S. ____, 110 S.Ct. 51 (1989). There is no such Ohio policy. *O'Brien* v. *Stein* does not hold that appeals cannot be dismissed for failure to comply with local rules, only that the violations present in that case did not warrant dismissal.[4] Petitioner's "policy" argument further ignores the pronouncement of the Ohio Supreme Court in *Vorisek* v. *Village of North Randall*, 64 Ohio St. 2d 62, 413 N.E.2d 793 (1980), that,

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[3] Further, it is questionable whether it is truly any more difficult for a non-resident to obtain access to the local rules of the Ohio courts of appeals than it is for a non-resident to obtain access to the rules of civil and appellate procedure applicable throughout the state. Both the local courts of appeals' rules and the rules of civil and appellate procedure promulgated by the Ohio Supreme Court for application throughout Ohio are commercially available in a single volume. *See e.g.*, Ohio Rules of Court — State (West, published annually).

[4] It should further be noted that the summary judgment which was the subject of the appeal in *O'Brien* v. *Stein* was affirmed by the Ohio Tenth

> While the sanction of dismissal is an extreme measure, not to be indiscriminately applied, the line must be drawn so that Local Rules continue to be respected and the threat of sanctions continues to be an effective deterrent to rampant disregard of those rules.

64 Ohio St. 2d at 65, 413 N.E.2d at 795. In short, there is no Ohio policy which was applied to Petitioner in a discriminatory fashion. *See also Cassidy* v. *Glossip*, 12 Ohio St. 2d 17, 25-26, 231 N.E.2d 64, 69 (1967) (rejecting contention that Ohio trial courts cannot adopt a local rule unless such rule is adopted statewide).

This Court declared 60 years ago, that

> [t]he due process clause does not guarantee to the citizen of a state any particular form or method of state procedure. . . . Nor does the equal protection clause exact uniformity of procedure.

Dohany v. *Rogers*, 281 U.S. 362, 369 (1930). The Petitioner has not shown a constitutional infirmity in the Ohio court's Local Rule 4(A). Unquestionably, Petitioner is not in as good a position as an appellant who took the trouble to learn and obey the Ohio court's rules. However, "the Fourteenth Amendment guarantees equal laws, not equal results." *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256, 273 (1979). Eighth District Rule 4(A) is an equal law.

Leaving aside the merits of Petitioner's contentions, Petitioner has not demonstrated any reason why certiorari should be granted in this case. No conflict among lower courts has

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District Court of Appeals as part of its published decision in that case. It should also be noted that in *DeHart* v. *Aetna Life Insurance Co.*, 69 Ohio St. 2d 189, 431 N.E.2d 44 (1982), cited in the Petition, the appellant's counsel *had* filed the praecipe required by the local rule but had inadvertently marked an incorrect box on the praecipe form. 69 Ohio St. 2d at 189, 431 N.E.2d at 645.

been shown. No issue of public importance has been identified. At most, Petitioner seeks a decision from this Court that would necessarily be limited to particular facts of this case. Petitioner has not shown that this is a constitutional issue of general public importance. When the Court's prior Fourteenth Amendment decisions are examined, it is plain that Petitioner has shown no constitutional issue at all.

Petitioner William Kuntz III's Petition for a Writ of Certiorari should be denied. Petitioner has failed to demonstrate the existence of even an arguable deprivation of a federal constitutional right, much less a question so important as to warrant review by the Supreme Court of the United States.

CONCLUSION

For the reasons set forth below, the Petition for Certiorari of Petitioner William Kuntz, III should be denied.

Respectfully submitted,

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APPENDIX

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY

CASE NO. 80-07544

JUDGE TIMOTHY E. McMONAGLE

WILLIAM KUNTZ, III,

Plaintiff,

v.

LITTLE MIAMI RAILROAD COMPANY,

Defendant.

ORDER
(Filed October 6, 1989)

On August 7, 1989, counsel for plaintiff and defendant appeared for a pretrial before the Court. At such pretrial the Court ordered:

1. Plaintiff's Counsel to forward plaintiff's original trial exhibits to defendant's Counsel's office (Taft, Stettinius & Hollister, 1800 Star Bank Center, Cincinnati, Ohio) by no later than September 8, 1989, along with a list of trial exhibits in the order that plaintiff will use them at trial;

2. Plaintiff's Counsel to make Mr. Pike Levine, plaintiff's expert, available at plaintiff's costs for deposition at defendant's Counsel's office prior to November 8, 1989;

3. Future expenses of the Court appointed appraiser initially shall be advanced in equal shares by plaintiff and defendant, with such expenses to be taxed as costs and assessed by the Court after the hearing.

4. A final pretrial to be held November 20, 1989, with the hearing on confirmation of appraiser's report to be scheduled promptly thereafter.

IT IS SO ORDERED.

/s/ TIMOTHY E. McMONAGLE
Judge

Dated 10-5-89